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The Honorable Frank L. Kurtz

7 Attorneys for Debtor in possession

8 UNITED STATES BANKRUPTCY COURT
9 EASTERN DISTRICT OF WASHINGTON

10 In re:

No. 11-01020-FLK11

11 DAICHII SOLAR WORLD, LLC,

12 Debtor in possession.

**DEBTOR'S EMERGENCY
MOTION FOR ORDER:**

13 (1) DEEMING UTILITY
14 COMPANIES ADEQUATELY
15 ASSURED OF FUTURE
16 PERFORMANCE, (2)
17 ESTABLISHING PROCEDURES
18 FOR ADDITIONAL ASSURANCE,
19 AND (3) RESTRAINING UTILITY
20 COMPANIES FROM
21 DISCONTINUING, ALTERING OR
22 REFUSING SERVICE, AND;
23 MEMORANDUM OF
24 AUTHORITIES IN SUPPORT

25 **I. INTRODUCTION AND SUMMARY OF RELIEF REQUESTED**

26 Daichii Solar World, LLC (hereinafter alternatively referred to as the
27 "Company" or the "Debtor") filed for protection under Chapter 11 of the
28 Bankruptcy Code on March 3, 2011 (the "Petition Date"). The Debtor remains

29 EMERGENCY MOTION FOR ORDER DEEMING UTILITY PROVIDERS ADEQUATELY
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1 in possession of its assets and continues to operate and manage its business
2 pursuant to 11 U.S.C. §§ 1107 and 1108.
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4 In accordance with 11 U.S.C. § 366, the Debtor hereby makes its adequate
5 assurance proposal to utilities. The terms of the adequate assurance proposal are
6 set forth in section III below and proposed procedures in connection therewith
7 are set forth in Sections IV and V below. Pursuant to this motion the Debtor
8 requests that the court issue an order:
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- 11 1. Determining that utility providers have been provided with adequate
12 assurance of payment within the meanings of Section 366 of the
13 Bankruptcy Code;
- 14 2. Approving the Proposed Adequate Assurance (as defined below);
- 15 3. Prohibiting utility providers from discontinuing, altering, or refusing
16 service to, or discriminating against the Debtor;
- 17 4. Establishing procedures for utility providers to opt out of the proposed
18 Adequate Assurance Procedure; and
- 19 5. Determining that the Debtor is not required to provide any additional
20 assurance, beyond what is proposed in this Motion.
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22 II. Debtor's Utilities

23 In connection with the operation of its business, the Debtor obtains
24 electricity, water/sewage, waste removal, telephone, cable and other services
25 from a number of different utility providers (the "Utility Providers"). A list of
26 the Debtor's continuing Utility Providers, and the amounts of the Debtor's
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1 average one month charges for each utility during the twelve months prior to the
2 commencement of this proceeding, is attached hereto as Appendix "A".
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4 The Utility Providers supply the Debtor with services essential to the
5 continuation of the Debtor's business operations. Any interruption in the utility
6 services provided to the Debtor would seriously disrupt the Debtor's operations
7 and could jeopardize reorganization. The Debtor estimates that the aggregate
8 amount due for a month of service at both property locations is \$16,380.56,
9 based on the average over the last twelve months. The Debtor is hereby
10 furnishing adequate assurance of payment to the Utility Providers, as described
11 below.
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15 III. Adequate Assurance

16 The Debtor fully intends to pay all postpetition obligations owed to the
17 Utility Providers in a timely manner. The Debtor has consistently made
18 payments to the Utility providers that it will continue to receive services from.
19 The Debtor's history of timely making payments to Utility providers should be
20 found to provide adequate assurance (the "Adequate Assurance") of continuing
21 postpetition payments as the payments become due and owing.
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25 The Utility Providers shall be found to have been provided Adequate
26 Assurance within the meaning of § 366, and shall further be deemed to have
27 waived any right to seek additional adequate assurance during this Chapter 11
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1 proceeding, unless the Utility Provider makes an additional adequate assurance
2 request no later than thirty (30) days after entry of this Order by the Court.
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4 **IV. Proposed Adequate Assurance Procedures**

5 Section 366(a) of the bankruptcy Code recognizes the necessity of
6 continuous utility services and prohibits utility providers from altering, refusing
7 or discontinuing utility services to, or discriminating against, a debtor due to
8 either its bankruptcy filing or any outstanding prepetition obligations for a period
9 of thirty days after the filing of the Petition. At the conclusion of the thirty day
10 period, however, a utility company may discontinue services if a debtor has not
11 furnished adequate assurance of payment. 11 U.S.C. § 366(c)(2).
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15 In light of the severe consequences to the Debtor of any interruption in
16 utility services, but recognizing the right of Utility providers to evaluate the
17 Proposed Adequate Assurance, the Debtor is proposing procedures that will
18 enable it to cooperatively work with the Utility Providers in a coordinated
19 manner to resolve any adequate assurance issues. If the Debtor and the Utility
20 Providers cannot resolve such issues, the Court should determine first whether
21 additional adequate assurance of payment is necessary and, if so, how much it
22 should be before the Utility Provider may cease performance for failure of
23 adequate assurance. The Debtor proposes the following procedures to effectuate
24 said result:
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- 1 1. The Debtor will expeditiously send a copy of this Motion to each
2 Utility provider that the Debtor seeks to continue business with.
- 3 2. A Utility Provider desiring additional assurances of payment must
4 serve a request (an "Additional Assurance Request") upon the Debtor
5 (through the Debtor's counsel.
- 6 3. The Additional Assurance Request must be made and actually received
7 by the Debtor's counsel no later than thirty days after entry of the Order
8 approving this Motion. If a Utility Provider fails to timely file and
9 serve its request, it shall be forbidden from discontinuing, altering or
10 refusing service to the Debtor on account of any unpaid prepetition
11 charges or the commencement of this Chapter 11 case, or require
12 Additional Assurance, and shall be deemed to have received Adequate
13 Assurance pursuant to § 366.
- 14 4. Any Additional Assurance Request must: (i) be made in writing; (ii) set
15 forth the location for which utility services are provided; (iii) identify
16 the Utility Provider; (iv) briefly describe the type of utility services
17 provided; (v) include a summary of the Debtor's payment history
18 relevant to the affected account(s), including any security deposits, and;
19 (vi) set forth why the Utility Provider believes the Proposed Adequate
20 Assurance is not sufficient assurance of future payment.
- 21 5. Upon the Debtor's receipt of any Additional Assurance Request, the
22 Debtor shall have (a) fourteen days from the receipt of any Additional
23 Assurance Request, or (b) thirty days from the Petition Date
24 (collectively, the "Resolution Period") to negotiate with the Utility
25 provider to resolve that Utility Provider's Additional Assurance
26 Request. During this period the Utility provider shall not behave in the
27 manner described above in Section IV(3).
- 28 6. The Debtor may, in its discretion, resolve any Additional Assurance
29 Request by mutual agreement with the Utility Provider and without
30 further order of the Court, and may, in connection with any such
31 agreement, in its discretion, provide a Utility provider with Additional
32 Assurance, including, but not limited to, cash deposits, prepayment
33 and/or other forms of security, without further order of this Court, if the
34 believes such Additional Assurance is reasonable.

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2 7. If the Debtor determines that the Additional Assurance Request is not
3 reasonable and is not able to reach an alternative resolution with the
4 Utility Provider during the Resolution period, the Debtor, during or
5 immediately after the Resolution period, will request a hearing before
6 this Court to determine the adequacy of assurances with respect to the
7 particular Utility Provider, pursuant to § 363(c).

8 8. Pending resolution of any such determination hearing, such Utility
9 Provider shall be restrained from acting in the manner described above
10 at Section IV(3).

11 The Debtor does not anticipate any problems in honoring its utility
12 obligations, and expects that its use of Cash Collateral (as outlined in the Motion
13 and Memorandum for use of Cash Collateral) will be more than sufficient to pay
14 all postpetition utility obligations. Accordingly, the Debtor believes that
15 additional adequate assurance payments will prove to be unnecessary, and if
16 forced to submit the matter before this Court, would argue the same.
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18 **V. Opting Out**

19 Any Utility Provider who objects to the Adequate Assurance Procedures
20 outlined above must file an objection to such procedures no more than twenty
21 four (24) days after the entry of an Order by this Court approving this Motion.
22 Any Procedure Objection must (i) be made in writing; (ii) set forth the location
23 for which utility services are provided; (iii) identify the Utility Provider; (iv)
24 briefly describe the type of utility services provided; (v) include a summary of
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1 the Debtor's payment history relevant to the affected account(s), including any
2 security deposits; (vi) set forth why the Utility Provider believes the Proposed
3 Adequate Assurance is not sufficient assurance of future payment, and; (vii) set
4 forth why the Utility Provider believes it should be exempted from the Adequate
5 Assurance procedure.
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8 If an objection is not filed to the Adequate Assurance Procedures, the
9 Utility Providers will be deemed to have consented to said Procedures.
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11 VI. Basis for Relief Requested

12 Courts have discretion to determine the amount of adequate assurance
13 payment and, where appropriate, to determine that no such payment is
14 necessary. See *In re Astle*, 338 B.R. 855, 861 n. 14 (Bankr.D.Idaho
15 2006)("Since BAPCPA did not amend § 366(b), the case law interpreting
16 that subsection [prior to BAPCPA] is still applicable"). It is well established
17 that § 366(b) permits a court to find that no adequate assurance payment at
18 all is necessary to provide a utility company with adequate assurance of
19 payment. See, *Virginia Elec. & Power Co. v. Caldor, Inc.* 117 F.3d 646,
20 650 (2nd Cir. 1997).
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22 Additionally, § 366(c), like § 366(b), simply requires a utility's
23 assurance of payment being "adequate." Courts have long recognized that
24 adequate assurance of performance does not require an absolute guarantee of
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1 a debtor's ability to pay. *In re Adelpia Bus. Solutions, Inc.*, 280 B.R. 63,
2 80 (Bankr. S.D.N.Y. 2002); See also, *In re Steinbach*, 303 B.R. 634, 641
3 (Bankr.D.Ariz. 2004)("Adequate assurance of payment is not, however,
4 absolute assurance...all § 366(b) requires is that a utility receive only such
5 assurance of payment as is necessary to protect its interest given the facts of
6 the debtor's financial circumstances").
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10 Based upon the foregoing, the Debtor believes that all Utility
11 Providers have adequate assurance of payment without any additional
12 adequate assurance provisions. As previously discussed the Debtor will pay
13 its operating costs, including utility costs, as they come due. These factors –
14 which the court may (and should) consider when considering the amount of
15 any adequate assurance payments – justify a finding that no adequate
16 assurance payment is required to any Utility Provider.
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20 VII. CONCLUSION

21 The Debtor respectfully requests that the Court grant the Debtor's Motion,
22 and find that the Utility providers are deemed adequately assured, and approve
23 the foregoing proposed dispute procedures.
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1 DATED this 7th day of March, 2011.

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3 MURPHY, BANTZ & BURY, P.S.
4 /s/ Timothy R. Fischer
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6 TIMOTHY R. FISCHER, WSBA # 40075
7 Attorneys for Debtor-in-Possession
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APPENDIX “A”

North Spokane Location

Vendor	12 MO Avg
AT&T	\$49.42
Avista Utilities	\$1,484.60
City of Airway Heights	\$0.00
City of Spokane	\$1,950.94
Comcast Cable	\$504.51
Qwest	\$739.54

West Spokane Location

Vendor	12 MO Avg	Notes
AT&T	\$217.37	
City of Airway Heights	\$3,345.38	
Comcast Cable	\$1,982.52	
Inland Power & Light	\$4,445.23	
Qwest	\$552.98	
Sunshine Disposal & Recycling	\$1,117.07	